BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GREGORY T. KREBAUM	)	
Claimant	)	
V.	)	Docket No. 1,068,194
	)	
CITY OF HUTCHINSON	)	
Self-Insured Respondent	)	

ORDER

Respondent, through William Townsley, of Wichita, requested review of Administrative Law Judge Thomas Klein's February 16, 2015 Award. Scott Mann, of Hutchinson, appeared for claimant. The Board heard oral argument on June 19, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. However, the indication in the Award that the record consisted of records "from Dr. H. William Barkman" actually concerns records which the parties stipulated into evidence as having been reviewed by Dr. Barkman. The parties did not agree that the Board could take independent consideration of portions of the AMA *Guides*[1] (hereafter *Guides*) that were not in evidence.[2]

ISSUES

Claimant alleged occupational asthma from repeated exposure to smoke through October 30, 2013. The judge awarded claimant a 9% functional impairment to the body as a whole and 46.5% work disability after finding claimant sustained "personal injury by accident, occupational disease"[3] that arose out of and in the course of his employment, including that claimant's occupational exposure to smoke and chemicals was the prevailing factor in causing his injury, need for medical treatment, impairment and disability.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

[2] The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. See *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. See, e.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sep. 15, 2011).

[3] ALJ Award at 3.

Following oral argument, the Board sent the parties the following email:

> As we discussed on Friday, in *McLaughlin v. DeCommun, Inc.*, No. 1,049,335, 2013 WL 1384381 (Kan. WCAB Mar. 14, 2013), the Board calculated benefits in an occupational disease using a claimant's loss of earning capacity and noted task loss was irrelevant based on *Burton v. Rockwell Int'l*, 266 Kan. 1, 7, 967 P.2d 290 (1998). Also, in *Schubert v. Peerless Products, Inc.*, 223 Kan. 288, 573, P.2d 1009 (1978), our Supreme Court cited "injustice" to state, "We feel the act contemplates recovery for an occupational disease where there is no functional disability." *Id.* at 293.
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> You are both invited to brief the potential impact of these cases, or any other occupational disease cases, on the instant case. Please file any briefs by June 30, 2015.

Respondent requests reversal, arguing claimant failed to prove he sustained an occupational disease, in part because asthma is an ordinary disease of life. Respondent challenges causation, pointing to claimant's work as a gunsmith and his recreational activity of competitive firearm shooting as potential reasons for his alleged lung problems. Alternatively, respondent argues claimant is not entitled to permanent disability benefits because claimant's lung function testing is normal and it could take years to determine if his condition is indeed permanent. Further, even if claimant's impairment is 9% to the body as a whole, respondent asserts strict construction of the *Guides* mandate such impairment is still 0% or no impairment. According to respondent, unless claimant proves at least a 10% impairment, he has no impairment under the *Guides*.

Respondent noted *Schubert's* dicta that a claimant need not prove "functional disability" to recover for an occupational disease is outdated and irrelevant to determine benefits due, if any, in this case. If claimant's case is compensable, respondent agreed his benefits should be based on functional impairment or his loss of earning capacity (and not based on task loss).

Claimant maintains the Award should be affirmed. Claimant argues no doctor gave claimant a 0% rating and Dr. Barkman's 9% rating cannot be disregarded because it is reasonable, undisputed and consistent with the *Guides*. Claimant argued his functional impairment is irrelevant because his disability benefits should be based on his loss of earning capacity, without consideration of his task loss percentage.

The issues for review are:

(1) Did claimant suffer an occupational disease arising out of and in the course of his employment?

(2) What is the nature and extent of claimant's disability, if any?

FINDINGS OF FACT

Claimant, 49 years old, began working for respondent in April 1991, as a firefighter and was promoted to fire truck driver within a few years. If his truck was the first at the scene, he was responsible for operating the truck. Otherwise, he would fight the fire alongside other firefighters.

During a typical fire, claimant wore a self-contained breathing apparatus (SCBA), a complete mask used to breathe oxygen. He was not required to wear the SCBA for grass fires or outside structure fires, which he estimated was about 30% of the fires he fought. Claimant testified once he was cleared to remove the SCBA after a house fire, he would still be "getting a cocktail of other burnt chemicals and everything else."[4] While claimant never received medical treatment following a house fire, he did on several occasions experience a headache the following day, which he attributed to breathing smoke or chemicals after a fire. He never took medication for his headaches.

Claimant has had a chronic cough for at least five years. Some days, he will have 15-20 coughing spells, but he hardly coughs at all on other days. Claimant testified he had a couple of incidents where he was short of breath, which he thought might be age-related. Claimant believed he might have seasonal allergies, but had not been tested and does not take allergy medication. He has never smoked tobacco products.

On October 30, 2013, claimant underwent a job-required physical examination by Verlin Janzen, M.D. Claimant failed the respiratory capacity part of the test – he had a mild-moderate obstruction. He was referred to Steven Ronsick, M.D., a pulmonologist, who performed a second test, which claimant passed. Still, Dr. Janzen would not return claimant to work because of National Fire Protection Association standards for occupational safety. According to claimant, Dr. Ronsick diagnosed him with asthma caused by his firefighting duties.[5] Claimant filed for medical disability retirement. Respondent terminated claimant's employment on or around January 23, 2014.

On May 5, 2014, respondent sent claimant to William Barkman, M.D., who is board certified in internal medicine and pulmonary disease. Claimant provided a history of a chronic cough for five to seven years with coughing spells lasting several weeks, in addition to shortness of breath following a couple of fires in 2013. Dr. Barkman performed testing which showed claimant's spirometry, lung capacity and diffusion capacity were all normal. Dr. Barkman diagnosed claimant with work-related irritant asthma. The doctor stated:

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[4] Clmt. Depo. at 49.

[5] Claimant offered into evidence a letter containing Dr. Ronsick's causation opinion. (Barkman Depo., Ex. 3). Respondent objected to medical hearsay. The judge did not rule on the objection. Claimant appended Dr. Ronsick's same letter to his Appeals Board Brief. Absent agreement of the parties or Dr. Ronsick's testimony, we will not consider Dr. Ronsick's letter. See K.S.A. 44-519; K.A.R. 51-3-5a.

> Historically, there is no sentinel event of specific fire or severity of a fire that led to him requiring medical attention. He did note, however, that he had developed a cough and in the last year he had more difficulty with exercise associated with his job. His pulmonary functions were slightly abnormal. He was placed on albuterol as needed and retired because of his medical condition. Since retirement, his pulmonary function test has improved despite no specific therapy except avoidance of fumes and smoke associated with fire. Historically, there was no ongoing history of recurrent viral infections or allergies that could have been the prevailing cause of his cough and shortness of breath. Given the body of information available, I feel it is most likely that this is a work-related asthma. As he is getting better with avoidance, it is not clear what his long-term level of impairment would be. Currently, I would rate his partial permanent disability approximately 9% whole person.[6]

Dr. Barkman based claimant's rating on normal pulmonary function and a historic cough occasionally requiring a medication inhaler. The chart Dr. Barkman used to rate claimant consists of four classes based on lung testing. Table 8, p. 162 of the *Guides* shows Class 1 is 0% or no respiratory impairment. Classes 2, 3 and 4 concern mild, moderate and severe impairment, with respective impairments of 10-25%, 26-50% and 51-100%. Dr. Barkman interpreted the *Guides* as indicating Class 1 impairment is not just 0%, but a range of 0% to 9%, because the other categories had ranges.[7]

Dr Barkman indicated he could not forecast the future and claimant could get better or worse.[8] He noted asthma is reversible, but can become fixed if left untreated for years. The doctor testified "some people believe you should wait to rate and release somebody up to two years away from the exposure" and it was a "little early" for him to say with 100% accuracy whether claimant's condition is permanent because it can take up to two years away from exposure to see if the individual's symptoms may change.[9]

Dr. Barkman testified claimant's condition was due to firefighting:

> . . . I couldn't come up with a . . . scenario that would be plausible. In other words, he didn't have any history of recurrent bronchitis from viruses. He's a nonsmoker. He denied any specific allergies that caused breathing problems, although he did have some seasonal upper respiratory. He did not wheeze with those.

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[6] Barkman Depo., Ex. 6 at 2.

[7] *Id*. at 63-64, 70.

[8] *Id*. at 66-67.

[9] *Id*. at 20.

> So I felt, given his history, that the prevailing cause in this case was his exposures that he'd had as a firefighter at the site of the fire - - exposure to fire, not what was occurring on his routine activities in the firehouse or whatever. These were specific to him fighting fire.[10]

Along these same lines, before and after his medical retirement, claimant operated a business building, modifying and repairing guns and he shoots firearms competitively. Dr. Barkman did not think claimant's exposure to chemicals in connection with his gunsmithing or shooting would likely lead to asthma or would be as likely a cause as compared to claimant's exposure to smoke and chemicals as a firefighter.[11]

Dr. Barkman agreed 10-15% of adults have asthma and testified asthma is "such a common disease in the population that occasionally a firefighter will have it."[12]

Dr. Barkman opined claimant would not be able to return to his former employment. Out of the 13 tasks prepared by Steve Benjamin, Dr. Barkman testified claimant would be unable to perform 4 of them for a 31% task loss. Based on Karen Terrill's task list, Dr. Barkman indicated claimant could no longer perform 5 of 26 tasks for a 19% task loss.

Steven Benjamin testified on August 12, 2014. Mr. Benjamin has been a vocational counselor for more than 20 years and interviewed claimant on March 10, 2014, at the request of claimant's attorney. Based on claimant's pre-injury and post-injury wage for his gunsmith business, Mr. Benjamin testified claimant's wage loss would be 69.6%. However, he believed claimant is capable of earning $483.83 per week in the human resources area for a 65.1% wage loss.

On September 22, 2014, claimant was interviewed by Karen Terrill, M.S., who was hired by respondent. Ms. Terrill calculated claimant's average weekly wage as $421.02 based upon his reported gross profits in 2013. Ms. Terrill opined claimant is capable of earning $696 per week as a retail manager.

Claimant currently earns $421.02 weekly in his gun business. Claimant does not currently take any medication for his asthma, but does have a rescue inhaler. Claimant testified the asthma does not affect him or cause him to change anything about the way he does things. He is able to use an elliptical exercise machine for 20 minutes at a time three times a week without shortness of breath.

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[10] *Id*. at 18; see also pp. 36-37.

[11] *Id*. at 50-53. Dr. Barkman indicated the chemicals claimant might use as a gunsmith would have the "potential" to cause irritated airways and claimant applying chemical coatings to guns "could" have a causative factor for asthma. *Id.* at 52.

[12] *Id*. at 45.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by occupational disease arising out of and in the course of employment.[13] Claimant must prove his or her right to an award based on the whole record under a "more probably true than not true" standard.[14]

K.S.A. 2013 Supp. 44-5a01 provides in relevant part:

> (a) . . . the disablement or death of an employee or workman resulting from an occupational disease as defined in this section shall be treated as the happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation for such disablement or death resulting from an occupational disease, in accordance with the provisions of the workmen's compensation act as in cases of injuries by accident which are compensable thereunder, except as specifically provided otherwise for occupational diseases. . . .
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> (b) "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases . . . .

In the face of K.S.A. 44-5a01(a), the Kansas Court of Appeals stated the occupational disease statutes "provide no instruction on computing a worker's compensation."[15] However, given that an occupational disease award may be canceled under K.S.A. 44-5a04 if the worker is capable of earning the same or higher wages as at the time of disablement, the Kansas Supreme Court stated:

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[13] K.S.A. 2013 Supp. 44-501b(b).

[14] K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h).

[15] *Slack v. Thies Development Corp.*, 11 Kan. App. 2d 204, 206, 718 P.2d 310, *rev. denied* 239 Kan. 694 (1986).

> If the capacity of the workman to earn the same or higher wages than he did at the time of the disablement, from any trade or employment, is relatable to the amount of compensation due, so that the award may be cancelled, then it logically follows that his capacity to earn wages from any trade or employment is relatable to the amount of compensation due, to the extent the award may be diminished accordingly.[16]

In *Burton*,[17] the Kansas Supreme Court noted the term "disability," for occupational disease purposes, is based on a claimant's loss of earning capacity. The Board has followed *Burton* and indicated task loss is irrelevant to occupational disease claims.[18]

The trier of fact decides which testimony is more accurate and/or credible and adjusts the medical testimony with claimant's testimony and any other relevant testimony. The trier of fact makes the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[19]

ANALYSIS

As stated in *Moore*,[20] "The resolution of [claimant's] case turns on whether his asthma is an 'occupational disease' or an 'ordinary disease of life.'" *Moore* points out that not all asthma is an ordinary disease of life and can be compensable, depending on the evidentiary record. In this case, the evidence supports the judge's ruling regarding compensability, but we conclude claimant's permanent disability benefits should be computed differently.

Claimant sustained a compensable occupational disease that arose out of and in the course of his employment. We agree with Dr. Barkman that claimant developed occupational asthma from his work as a firefighter. Claimant lost his job as a firefighter because of his work-related condition. His occupational asthma was a reasonable consequence of and a direct result of his firefighting and was not contracted as an ordinary disease of life outside of claimant's employment or as a risk associated with other occupations or employments. We agree with Dr. Barkman that claimant has a 9% whole body functional impairment rating under the *Guides*.

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[16] *Knight v. Hudiburg-Smith Chevrolet, Olds., Inc.*, 200 Kan. 205, 209, 435 P.2d 3 (1967).

[17] *Burton, supra* at p. 2; see also *Knight, supra*; *Schubert, supra* at p. 2.

[18] *McLaughlin, supra* at p. 2.

[19] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991), *superceded on other grounds by statute*.

[20] *Moore v. Cimarex Energy Co., Inc.*, No. 110,192, 2014 WL 2747644 (Kansas Court of Appeals unpublished opinion filed June 13, 2014), *rev. denied* Feb. 18, 2015.

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[21] Dr. Barkman's opinions are not improbable, unreasonable or untrustworthy. There are no competing opinions. Dr. Barkman doubted claimant's side work as a gunsmith or his hobby of shooting firearms competitively was the cause of his asthma.

Dr. Barkman indicated Class 1 actually encompasses a range of impairment between 0% and 9%. At oral argument, respondent stated Class 1 "incorporates" whole body ratings between 0% and 9%. Respondent also stated, "The range in class one (from 0-9%) is considered no impairment of the whole person."[22]

Respondent posits claimant must prove at least a 10% impairment (and be in Class 2 or higher) to have any impairment because the *Guides* define Class 1 (under a 10% impairment) as a 0% or no impairment. Dr. Barkman rejected such approach. Dr. Barkman's rating and corresponding explanation are undisputed based on the evidence. Contrary to respondent's interpretation of the *Guides*, Dr. Barkman did not agree that a 9% impairment actually is a 0% impairment. No physician indicated claimant had a 0% impairment. The Board finds it counterintuitive to conclude a 9% rating is actually a 0% rating based on how the *Guides* groups respiratory impairments. A 9% impairment is a 9% impairment, not a 0% impairment.

Respondent also argues claimant's condition is not permanent because it could change. Dr. Barkman correctly indicated he cannot portend if claimant's respiratory condition will improve, remain the same or deteriorate. Such statement would appear to be true for many ailments. In any event, Dr. Barkman was able to determine claimant's current impairment. Dr. Barkman is not required to predict the future to give a valid opinion on claimant's current permanent impairment of function.

Following *Schubert*, *Knight* and *Burton* (and the agreement of the parties) claimant's recovery for his disability is based on his earning capacity. According to the vocational experts, claimant can earn between $483.83 and $696 per week. No evidence was set forth regarding the possibility of post-injury fringe benefits which might increase claimant's post-injury average weekly wage. We conclude claimant's earning capacity exceeds his current earnings of $421.02[23] and he is capable of earning a split of such figures, or $589.92 per week. Claimant can earn 44% of his pre-injury wage. Therefore, his permanent disablement is based on a 56% loss of earning capacity.

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[21] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

[22] Respondent's June 30, 2015 letter to Board at 2.

[23] If the computation of benefits is not based on K.S.A. 44-510e (as was the case in *Burton*, *Knight* and *Schubert*), the Board similarly will not apply the rebuttable presumption in K.S.A. 2013 Supp. 44-510e(a)(2)(E) that a worker's actual post-injury earnings constitute his or her earning capability.

CONCLUSIONS

Claimant's occupational disease arose out of and in the course of his employment. Claimant sustained a 9% whole body functional impairment. His permanent disablement is based on a 56% loss of earning capacity.

AWARD

WHEREFORE, the Board affirms the February 16, 2015 Award, with the exception of computing disability benefits differently.

The claimant is entitled to permanent disability compensation at the rate of $587 per week not to exceed $130,000 for a 56% disability.

As of July 7, 2015, claimant is due and owed 87.86 weeks of occupational disability compensation at the rate of $587 per week in the sum of $51,573.82 for a total due and owing of $51,573.82, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $78,426.18 shall be paid at the rate of $587 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of July, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
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Honorable Thomas Klein